



October 24, 2000

Ms. Camila Kunau  
Assistant City Attorney  
City of San Antonio  
P.O. Box 239966  
San Antonio, Texas 78283-3966

OR2000-4142

Dear Ms. Kunau:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 140453.

The City of San Antonio (the "city") received a request for "all proposals" submitted to the city's Convention and Visitors Bureau in connection with its Request for Proposals for an advertising contract. You have submitted for our review four proposals, submitted to the city by Bromley Communications, Inc. ("Bromley"), Atkins & Associates dba Center for the Persuasive Arts ("CPA"), Inventiva, Inc. ("Inventiva"), and Sanchez & Associates ("Sanchez"), formerly Sanchez Healy, Inc. You assert that this information is excepted from disclosure by section 552.104 of the Government Code, and you state the information may be excepted from disclosure by section 552.110 of the Government Code. We have considered the asserted exceptions and we have carefully reviewed the submitted information.

In your correspondence to this office dated August 16, 2000, you explain that the contract has not yet been awarded and you therefore assert that the information is excepted from disclosure under section 552.104 of the Government Code.

Section 552.104 states:

Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 at 2 (1987). As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

We have previously held in traditional bidding situations that so long as negotiations are in progress regarding the interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to the proposed contract, bidding should be deemed competitive and therefore, information relevant thereto may be withheld under section 552.104 prior to the award of the contract. Attorney General Opinion MW-591 (1982); Open Records Decision No. 170 (1977); *see* Open Records Decision No. 541 (1990). However, in this instance, by telephone on October 12, 2000, you have advised this office that the contract was awarded and that the winning bidder began work in September, 2000. In your comments pertaining to the section 552.104 assertion, other than advising that the contract had not yet been awarded, you make no arguments in support of the assertion. Because the contract has since been awarded, we conclude that the information is not excepted from disclosure by section 552.104 of the Government Code.

As indicated above, you also state that the information may be excepted from disclosure under section 552.110 of the Government Code. *See* Gov't Code § 552.110. The city makes no arguments in support of this exception. However, out of concern that the information at issue may involve the proprietary or property interests of Bromley, CPA, Inventiva, and Sanchez, you have notified each of these parties of the request by a letter dated August 11, 2000 in compliance with section 552.305 of the Act. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances).

Bromley, CPA, and Inventiva did not respond to the notice; therefore, we have no basis to conclude that any of the information contained in their proposals is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized

allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Sanchez, through its legal counsel, responded to the notice and asserts that the financial information contained in the Sanchez proposal is excepted under section 552.110. In support of the applicability of section 552.110 to the financial information, Sanchez states only the following:

We believe that the request to withhold financial information comes within the statutory exception contained in Section 552.110: Trade Secrets and Commercial or Financial Information. We very much appreciate your recognition and understanding of our objection to having financial data of [Sanchez] disclosed pursuant to the . . . request[.]

As to section 552.110(a), we do not believe that the above comments establish a *prima facie* case that any of Sanchez's financial data constitutes trade secret information. As to section 552.110(b), the above comments do not demonstrate by specific factual or evidentiary assertions, rather than conclusory or generalized allegations, that Sanchez actually faces competition and that substantial competitive injury would likely result to Sanchez from disclosure of the financial data. Accordingly, we conclude that none of the information contained in the Sanchez proposal is excepted from disclosure under section 552.110 of the Government Code.

In summary, because the information responsive to the request has not been demonstrated to be excepted from disclosure by either section 552.104 or section 552.110 of the Government Code, the information must be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

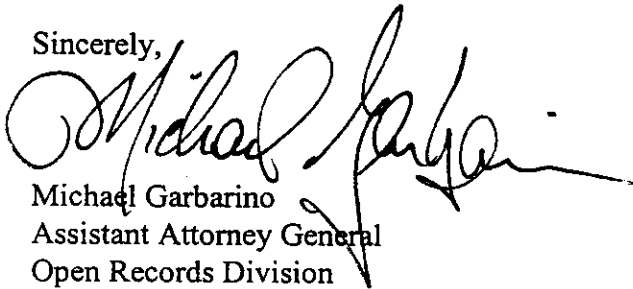
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/pr

Ref: ID#140453

Encl. Submitted documents

cc: Mr. Seagal Wheatley  
1400 Frost Bank Tower  
100 West Houston Street  
San Antonio, Texas 78205  
(w/o enclosures)

Mr. Manuel Sanchez  
Sanchez & Daniels  
333 West Wacker Drive, Suite 500  
Chicago, Illinois 60606

Mr. David Sanchez  
New Business Development  
Sanchez & Associates  
909 N.E. Loop 410, Suite 321  
San Antonio, Texas 78217-5234

Mr. Heberto Gutierrez, Principal  
Inventiva, Inc.  
1777 N.E. Loop 410, Suite 911  
San Antonio, Texas 78217-5234

Mr. Ernest Bromley, CEO  
Bromley Communications, Inc.  
401 E. Houston Street  
San Antonio, Texas 78205

Mr. Steve Atkins, President  
Atkins & Associates, Inc.  
dba Center for the Persuasive Arts  
1777 N.E. Loop 410, Suite 1100  
San Antonio, Texas 78217